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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

IAIN MALCOLM et al.,  
Plaintiffs and Respondents,  
v.  
DOE 1 et al.,  
Defendants;  
AHMED KHAN,  
Movant and Appellant.

A134367

(San Mateo County  
Super. Ct. No. CIV482779)

Plaintiffs Iain Malcolm, David Potts, Anne Walsh, and Rick O’Farrell sued unnamed Doe defendants for libel, invasion of privacy, and infliction of emotional distress arising from anonymous blog entries posted on Internet sites hosted by a California company. These sites were accessible from England where the plaintiffs reside. Plaintiffs conducted third party discovery to learn if Ahmed Khan, a political rival of plaintiffs, was the author of the entries. Khan, who was not named in or served with the complaint, filed a special motion to strike the complaint under Code of Civil Procedure section 425.16.<sup>1 2</sup> The trial court denied the motion, found it was frivolous,

<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

<sup>2</sup> Section 425.16 is commonly referred to as the “anti-SLAPP statute.” SLAPP stands for Strategic Lawsuit Against Public Participation. Section 425.16 was enacted in order to discourage the practice of filing retaliatory, meritless lawsuits against opponents on a public issue in order to chill their exercise of free speech. (See legislative findings in § 425.16, subd. (a).)

and awarded attorney fees and costs to plaintiffs. Khan appeals the ensuing order. We affirm.

## **I. BACKGROUND**

Plaintiffs Malcolm, Potts, and Walsh are elected councillors on the South Tyneside Council located in Tyne and Wear, England, and plaintiff O'Farrell is an employee of the South Tyneside Council. South Tyneside is a metropolitan borough in England. In April 2009, plaintiffs filed a complaint in San Mateo Superior Court alleging causes of action for libel, false light invasion of privacy, and intentional and negligent infliction of emotional distress against unknown Doe defendants. The complaint alleged one or more anonymous authors, using the name "Mr. Monkey" as well as other made-up names, had published a lengthy series of blog posts in 2008 and 2009 making numerous false and defamatory statements about plaintiffs on Internet sites hosted by WordPress.com. The complaint alleged WordPress.com's business and domain servers are located in Redwood City, and the trial court had personal jurisdiction over the defendants because they had "purposefully avail[ed] themselves of the services of a company located in the State of California" and "engaged in activity to create sufficient contact within the State of California to give rise to personal jurisdiction."

Plaintiffs initiated discovery from third parties to learn the true names of the person or persons responsible for the blog posts. These efforts included third party document requests directed to Word Press, Inc.'s parent company, Automattic, Inc., which hosted the original Mr. Monkey blogs, Google, Inc., on which Mr. Monkey launched a new blog in 2010, and Twitter, Inc. (Twitter), on which a user associated with the new Mr. Monkey blog opened user accounts. The Twitter document request, served in April 2011, sought, among other things, documents pertaining to accounts maintained by appellant Ahmed Khan, who is also a South Tyneside councillor. None of the account owners objected to or moved to quash plaintiffs' document requests.

In July 2011, Khan filed a special motion to strike the complaint under section 425.16. Citing plaintiffs' document requests to Twitter, he asserted he was a "target of this lawsuit." In his supporting declaration, Khan acknowledged he had not

been served with a summons or complaint in this action, or with a copy of the Twitter document requests. The complaint had not been amended to name him as a defendant. In the papers supporting his motion, Khan neither admitted nor expressly denied he was Mr. Monkey, although he had made such denials in the past in response to media inquiries in England.

Plaintiffs opposed Khan's motion to strike on the grounds Khan (1) had no standing as a nonparty to the case to move to strike the complaint, and (2) failed to demonstrate plaintiffs did not have a probability of establishing falsity and actual malice. Plaintiffs requested an award of their costs and reasonable attorney fees incurred in opposing the motion.

The trial court ruled as follows: "Non-party Khan failed to meet his threshold burden of showing that his acts arose from protected activity. (*Jewitt v. Capital One Bank* (2003) 113 Cal.App.4th 805, 811.) There is no showing that Khan engaged in the acts alleged in the Complaint and that a cause of action has been asserted 'against' Khan. (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1392 [(*Garamendi*)] (explaining the motion failed because the moving party 'did not satisfy the requirement of showing the action was brought against it'))." The trial court also found Khan's motion was frivolous and awarded costs and attorney fees to plaintiffs under section 425.16, subdivision (c)(1).<sup>3</sup> Khan timely appealed from the order denying his special motion to strike and awarding reasonable costs and attorney fees.

## II. DISCUSSION

Khan contends the *Garamendi* case is distinguishable because it did not involve protected activity by the person who was the target of the lawsuit, or protected activity consisting of speech and communications about public officials. He argues the anti-SLAPP statute should be broadly construed to protect targeted persons even if they are

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<sup>3</sup> Section 425.16, subdivision (c)(1) provides in relevant part that a plaintiff prevailing on a motion to strike may recover attorney fees and costs incurred in defeating the motion "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay."

not yet named defendants. Finally, he asserts the motion had at least partial merit and was not frivolous for purposes of section 425.16, subdivision (c)(1).

We review the trial court's order denying the motion to strike de novo. (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.) We review a determination that a motion to strike is frivolous for abuse of discretion, reversing it only if the trial court's finding exceeded the bounds of reason. (*Garamendi, supra*, 132 Cal.App.4th at p. 1388.)

#### **A. Denial of the Motion**

The anti-SLAPP statute authorizes the bringing of a special motion to strike as follows: "A cause of action *against a person* arising from any act *of that person* in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

As a threshold matter, a party bringing a special motion to strike has the burden of proving the cause of action sought to be dismissed arose from an act *by the moving party* that is protected by the statute: "[T]he statutory phrase 'cause of action . . . arising from' means simply that *the defendant's act* underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based* on an act *in furtherance of the defendant's right of petition or free speech*." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, citing *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67–68.) In other words, a party seeking to invoke the protection of the anti-SLAPP statute must, as a threshold matter, allege and prove the plaintiff's complaint arose from *his* acts in the exercise of *his* free speech rights. Failing that, the plaintiff has no burden of proving a probability of prevailing in the action. A nonparty to the action who disclaims responsibility for the publications alleged in the complaint and is not even alleged to be responsible in the complaint lacks standing to bring a motion under section 425.16.

In *Garamendi*, Mercury Insurance, which was an intervener, not a party defendant, in a public interest suit brought against the Insurance Commissioner, sought to have the suit dismissed under section 425.16. (*Garamendi, supra*, 132 Cal.App.4th at p. 1380.) The complaint included allegations concerning Mercury’s campaign contributions to state legislators and its successful efforts to get favorable legislation passed which the plaintiffs were seeking to have invalidated. (*Id.* at p. 1380.) The trial court denied the motion to strike, found it was frivolous, and awarded fees and costs to the plaintiffs. (*Id.* at pp. 1385–1387.) On appeal from the award, the Court of Appeal affirmed the trial court’s finding the motion was frivolous. (*Id.* at pp. 1389–1394.) Among other reasons, the court stated: “Section 425.16 provides a remedy with respect to ‘[a] cause of action *against* a person *arising from* any act of that person in furtherance of a person’s right of petition or free speech . . . .’ (§ 425.16, subd. (b)(1), italics added.) Petitioners did not name Mercury as a defendant in the complaint, nor did they seek any relief against Mercury in the complaint. Therefore, Mercury did not satisfy the requirement of showing the action was brought against it.” (*Id.* at p. 1392.) The court further found the lawsuit was not *based* on Mercury’s exercise of its free speech and petition rights—its efforts to get legislation passed—but was based on the constitutionality of the legislation that issued from that process. (*Id.* at p. 1393.)

In our view, Khan’s motion in this case rested on even shakier grounds than Mercury’s claim. Mercury had party status as an intervener in the *Garamendi* case when it filed its special motion to strike. Khan is not a party to this proceeding and has made no motion to intervene in it. The complaint in the *Garamendi* case contained specific allegations against Mercury at least arguably concerning its exercise of free speech rights. Here, Khan is not named in the complaint and does not admit the allegations of the complaint arose from his activities or exercise of free speech. Khan cannot have it both ways. He cannot claim standing to have the complaint dismissed, yet simultaneously deny he is a proper defendant against whom the action may proceed if the motion is denied. A special motion to strike is not a one-way street with no consequences for the moving party if he loses.

In addition to Khan's lack of standing, his motion was also premature under subdivision (f) of section 425.16 which provides: "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Under this subdivision, Khan's motion was premature and need not have been considered for any purpose by the trial court.

The fact Khan may be a "target" of the complaint, that is, a person suspected of being responsible for the allegedly defamatory statements is not sufficient to afford him standing or a right to file prematurely. There is no sound basis for relaxing these requirements on behalf of a person in Khan's position, and good reason to enforce them. Khan does not explain why he could not have waited to bring his motion until he was named and served as a defendant. If he objected to plaintiffs' third party discovery concerning his accounts he could have filed a motion to quash. (§ 1987.1, subd. (b)(5).) If he believed plaintiffs were unreasonably delaying in amending the complaint after learning of his identity, he could have waited until served and then objected to the amendment as untimely. (*A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1066–1067; *Barrows v. American Motors Corp.* (1983) 144 Cal.App.3d 1, 9.) On the other hand, allowing nonparties to move to strike the complaint could lead to anomalous results. The filing of a special motion to strike automatically stays discovery in the action. (§ 425.16, subd. (g).) It would be unfair to allow a potential defendant to cut off the plaintiffs' right to investigate whether that defendant is in fact responsible for defamatory statements. If such a nonparty's motion was granted, plaintiffs' right to proceed against other Doe defendants, or even conduct further discovery to learn their identities, would be put in jeopardy despite the possibility someone other than Khan authored one or more of the statements in issue. In our view, Khan's proposed "target" exception to the standing requirement is unnecessary, unworkable, and potentially prejudicial to the plaintiffs.

We need not consider Khan's arguments regarding the merits of his motion. Plaintiffs were under no burden to prove a probability of prevailing in the action since Khan failed to meet the threshold requirements for bringing the motion or shifting any

burden of proof to plaintiffs. (See, e.g., *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 [where movant cannot meet threshold showing, whether plaintiffs have probability of prevailing is irrelevant]; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 32 [same].)

### **B. Award of Fees and Costs**

As discussed, we believe the circumstances presented in this case are at least as egregious as those present in *Garamendi*, in which the Court of Appeal affirmed the trial court's finding that a motion to strike brought by an intervener was frivolous. (*Garamendi, supra*, 132 Cal.App.4th at pp. 1392–1394.) If the trial court in that case did not abuse its discretion by awarding fees to the plaintiffs, we cannot say the trial court's decision to award fees exceeded the bounds of reason in this case. (*Id.* at p. 1388.)

Khan decided to proceed with his motion despite a statute that clearly did not authorize it, and an appellate precedent finding a similar motion frivolous. By persisting in his motion, he delayed plaintiffs in their prosecution of the action and caused them to incur unnecessary fees. It was within the trial court's discretion to award fees under section 425.16, subdivision (c)(1).

## **III. DISPOSITION**

The order denying the special motion to strike and awarding reasonable costs and attorney fees to plaintiffs is affirmed.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.